SUPREME COURT, U. S.

MAY 3 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1354

CHARLES F. KRAUSE, Administrator, d.b.n., c.t.a. of the Estate of Larry L. Goldstein, Deceased,

Petitioner,

—against—

LUCIEN ANDRE CHARTIER, NORTH CENTRAL AIRWAYS, INC., and ELVIRA PETTERUTTI, Administratrix of the Estate of Pasco A. Petterutti,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. .....

CHARLES F. KRAUSE, Administrator, d.b.n., c.t.a. of the Estate of Larry L. Goldstein, Deceased,

Petitioner,

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LUCIEN ANDRE CHARTIER, NORTH CENTRAL AIRWAYS, INC., and ELVIRA PETTERUTTI, Administratrix of the Estate of Pasco A. Petterutti,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles F. Krause, Administrator, d.b.n., c.t.a. of the Estate of Larry L. Goldstein, Deceased, respectfully prays for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered herein on December 27, 1968, and the Order of said Court denying petitioner's petition for rehearing, entered February 4, 1969, which judgment and order affirmed, by a divided court, the judgment of the United States District Court for Rhode Island dated and entered on September 26, 1967, in favor of, and after jury verdict for, respondents.

Opinions Below

The opinion of the Court of Appeals is reported at 406 F.2d 898 (1st Cir. 1969) together with its opinion on denial of petitioner's petition for rehearing in that Court. The District Court did not render any opinion at any time. A copy of each opinion of the Court of Appeals is appended in the appendix to this petition.

Grounds of Jurisdiction

The date of the judgment sought to be reviewed and the time of its entry is December 27, 1968;

The date of the Court of Appeals' order denying the petition for rehearing is February 4, 1969;

The statutory provision conferring on this Court jurisdiction to review the judgment in question by writ of certiorari, is Title 28 U.S.C. § 1254(1).

Questions Presented

I. Was not the Court of Appeals' refusal to apply the law of Rhode Island on assumption of risk in this diversity case an unconstitutional assumption by that Court of a power reserved to Rhode Island, and was not such action in violation of the Tenth Amendment to the Constitution of the United States, an Act of Congress, 28 U.S.C. § 1652, and petitioner's rights under such Constitutional and Statutory provisions?

II. Was not the method of selecting the jury in this case in violation of plaintiff's rights under the Fifth and Seventh Amendments to the Constitution of the United States?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V, 28 U.S.C. provides in pertinent part:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

United States Constitution, Amendment VII, 28 U.S.C. provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Amendment X, 28 U.S.C. provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 28 U.S.C. § 1652 provides:

> "§ 1652. State laws as rules of decision
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Statement of the Case

This action was originally brought in the United States District Court for the District of Rhode Island by the petitioner-plaintiff, the administrator d.b.n., c.t.a. of the estate of Larry L. Goldstein, deceased, to recover damages on behalf of decedent's estate for his wrongful death. Jurisdiction of the District Court was based upon 28 U.S.C. § 1332(a)(1), the diversity of citizenship statute (5a; 496a).*

The decedent was killed while riding as a passenger in an airplane being piloted and flown by respondent-defendant, Lucien Andre Chartier. The airplane crashed while attempting a landing at Theodore F. Green Airport, Warwick, Rhode Island on October 31, 1962 (8a). At the time of Chartier's attempted landing the weather at the airport was below the airport's landing weather minimums. This fact was reported to Chartier, who acknowledged not only receiving such weather, but also that the weather given to him was in fact below the minimums for Green Airport (575a-576a).

The action was tried before the Court and jury and resulted in a jury verdict in favor of the defendants. Plaintiff's post-trial motions for judgment notwithstanding the verdict and, in the alternative, for a new trial, were denied without opinion. Plaintiff then appealed from the final judgment entered on the jury verdict to the Court of Appeals for the First Circuit, 28 U.S.C. § 1291. The Court of Appeals affirmed the District Court judgment by a vote of 2 to 1, *Krause* v. *Chartier,* et al., 406 F.2d 898 (1st Cir. 1968, Coffin, Dissenting). Petitioner then petitioned

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* For the Court's convenience, petitioner is including in his petition parenthetical references to the pages of the printed Record-Appendix used in the Court of Appeals, a certified copy of which has been filed with this Court pursuant to Rule 21.

the Court of Appeals for a rehearing, which petition was denied in a short opinion. Both opinions of the Court of Appeals (the only opinions rendered in this litigation) are set forth in the appendix to this petition.

This petition for review arises out of the following facts and circumstances.

On the day of the fatal accident, October 31, 1962, and for several months prior thereto, defendant-respondent Lucien Andre Chartier was employed as a pilot and flight instructor by Executive Flight Service, Inc. (516a). Prior to that time he was employed in the same capacity by defendant-respondent North Central Airways, Inc. on two separate occasions; two years the first time and six months the second time (459a). He first met the decedent Larry L. Goldstein while soliciting business for Executive Flight Service (460a) and began teaching him and giving him flying lessons the summer of 1962 (517a).

On the day of the accident Chartier was looking for and trying to get in touch with decedent to advise him that the early morning weather forecasts were not too favorable for the cross-country flight decedent was scheduled to make that morning (461a-462a).

About 8:15 a.m. Chartier met decedent in a restaurant in Woonsocket, R.I. and advised him that the weather forecasts indicated instrument flight rules (IFR) weather conditions, in which decedent was not qualified by experience or licensing to fly, might prevail during the day (462a; 518a). Upon being informed of this decedent agreed to give up his plan to fly to New Haven (518a). Both went separately to the Airport and met there (462a-463a) where Chartier attempted to rent an aircraft in which he would be able to fly decedent to New Haven under IFR conditions (466a).

At the airport terminal building, Chartier met Walter Larsen, the President of North Central Airways (NCA). Chartier asked Larsen if he, Chartier, could rent one of North Central's aircraft but was told that none was available. When Chartier asked Larsen if he could rent the Aero Commander aircraft owned by Pasco Petterutti he was told that he could not (466a).

The aircraft in question was a twin-engine Aero Commander type aircraft, bearing Registry No. N-2679B. It was certified by the FAA to be flown by one pilot; it did not require a co-pilot for its operation (494a). It was owned by defendant Pasco A. Petterutti and registered in his name with the Federal Aviation Agency (FAA) (7a). The aircraft was maintained by NCA pursuant to an oral arrangement between Petterutti and Larsen which they entered into a year or two before the accident (279a). NCA was only authorized to do maintenance that Petterutti requested it to do and he would not allow NCA to make any repairs unless he designated it to do so (284a-285a). The nature of the transaction was that NCA, through Larsen, would tell Peterutti when the aircraft needed maintenance, what was needed to correct it, and Petterutti would tell Larsen to go ahead and fix it; that was standard operating procedure (305a). NCA did not, however, do any radio repair work (305a) because Petterutti always had the radio work done in Bridgeport, Connecticut (319a) at Barber-Daniels, the only company that had proper equipment to repair the type radio in Petterutti's airplane (282a). Petterutti would also permit NCA to charter his Aero Commander whenever he was not going to use it and he used his share of the charter money income as a set-off to the periodic maintenance bills he received from NCA (278a-280a; 293a).

About ten days prior to the accident, Petterutti had requested Bielecki, NCA's vice-president, to take the Aero

Commander down to Bridgeport to have the radio repaired, whenever they had the chance to do so (287a). Thus after initially refusing Chartier's request to rent Petterutti's Aero Commander on the morning of the day of the accident, Larsen, after returning to his office, recalled the information that Bielecki gave him—Petterutti's request to take the airplane to Bridgeport for radio repairs for him at "our [NCA's] convenience" (626a).

Larsen then told Chartier that ". . . if he wanted to do Mr. Petterutti a favor" by taking the Aero Commander to Bridgeport to get the radio fixed that would be agreeable to Larsen (627a). When Chartier asked what the charge would be Larsen told him that "there was no charge, because this was for Mr. Petterutti that he'd be doing it for" (627a). The only restriction on Chartier was that he would take it to Barber-Daniels at the Bridgeport Airport to get the radio repaired. Larsen "didn't know that much about what the repair was . . ."; he just told Chartier "where to take it" (628a). Chartier was, of course, not only qualified to fly Petterutti's airplane (431a), but he had in fact flown it before (523a) on a number of previous occasions (491a-492a; 525a).

Chartier had the aircraft fueled and checked and he checked the Bridgeport weather conditions again (521a). Because the decedent had business in New Haven, Chartier attempted to land there first with the intention of then going on to Bridgeport. To this end he made an instrument approach to the New Haven airport using VOR (Very High Frequency Omni Range) approach procedures. He descended to the allowable minimum altitude permitted at New Haven Airport using such a VOR approach, but was compelled to execute a missed approach procedure (discontinuing the attempted landing) because he could not execute a normal landing because of weather conditions

(526a). He then flew to Bridgeport Airport where he made another VOR approach and landed without incident (527a).

After landing at Bridgeport, decedent drove to New Haven and Chartier took the aircraft to the Barber-Daniels facility at the airport for repair of the radio. He then had the aircraft refueled there to its full capacity (528a). When decedent returned to the Bridgeport airport late in the afternoon (475a), he and Chartier went to the weather office to obtain the latest weather for Green Airport (478a). The weather given to him was generally cloudy and much like it was that morning (478a) with the most recent weather showing an improvement and being *above* the minimums for Green Airport (545a), minimums of which Chartier was aware and which he checked prior to getting his weather briefing at Bridgeport (532a). Although decedent accompanied Chartier to the Meteorologist's office and was present while Chartier received his weather briefing, Chartier did not discuss this with decedent: "all [he] did was to tell him [decedent] that it was going to be cloudy" in Providence (478a). Chartier received no other weather prior to his take-off from Bridgeport (533a).

While at Bridgeport, Chartier filed a IFR (Instrument Flight Rules) Flight Plan with the FAA by telephone, listing Green Airport as his destination and Boston as his required alternate airport (479a). After a half hour delay at Bridgeport, Chartier took off for the return flight to Providence (532a) about 5:30 p.m. (480a). *The decedent accompanied him merely as a passenger; he had no duties with respect to the flight and Chartier did not give him any flight instruction* (480a). *Concededly, only Chartier flew the aircraft* (573a). He flew between cloud layers and he could see auto headlights on the ground (480a-481a). According to his FAA filed flight plan, his estimated time en-route from Bridgeport to Providence was 30 minutes:

he had four hours of fuel aboard when he left Bridgeport (Pltf's Exhibit 40, R. 625). About 16 to 20 minutes after taking off from Bridgeport, the tower there requested the Westchester Tower Flight Data position to advise Chartier, by broadcasting in the blind, that Providence weather was below limits; this was done (534a; Def. Chartier's Exhibit "B", pp. 7-8; R. 626). The Green Airport minimums were 300′ ceiling and ¾ mile visibility (545a).

After take-off and after arriving at and departing Saybrook Intersection, Chartier flew to the Norwich, Connecticut VOR station, a navigational facility. During this time he was unable to contact the Quonset Approach Control directly to report his position, so his communications with Quonset Control were made through an Allegheny Airlines flight, and later an American Airlines flight, each being in direct communication with both Chartier and the Quonset Approach Control facility (170a; 193a; 198a). Upon reaching the Norwich VOR and advising Quonset of this through the airlines, supra, Chartier was then advised to "hold" at that point. Although he requested a "hold" at Woonsocket, this request was not granted by Quonset Control (Pltf's Exhibit 7, page 7; R. 625). When an aircraft is told to "hold" this means he is to hold his then position, usually by making circling turns. The primary reason for the aircraft holding over Providence at that time was because of the bad weather (173a).

After Chartier was cleared by Quonset to climb from two to three thousand feet altitude, the second Allegheny flight departed for Boston, the first having been previously cleared by Quonset to Newark (194a). With Chartier still holding over Norwich, American Airlines flight 272 took over relaying Chartier's communications to Quonset (198a). When American flight 272 relayed the current Providence weather to Chartier of two hundred feet ceiling obscured

with one and a half miles visibility, and asked him if he intended to continue to hold, Chartier informed American Airlines flight 272 that he would like to go over Providence and "give it a try" (203a). This was then conveyed by the American flight to the Quonset control. Since the controller had no authority to refuse such a request (204a) Chartier was cleared by Quonset Control for an ILS (Instrument Landing System) approach to Providence (Green Airport) on a straight in Runway Five Right (208a). It was about this time that Chartier and Quonset Control came in direct radio contact (208a). Shortly thereafter Chartier intercepted the localizer course of the ILS and he was instructed to contact the local tower. controller at Green Airport (210a). Chartier's first contact with the Providence Tower local controller was at 6:30 p.m. Eastern Standard Time (214a). Thirty-five seconds later the local controller in the Providence Tower gave Chartier the latest weather as: "the Providence weather indefinite ceiling two hundred [feet], sky obscured, visibility one, [mile], fog . . ." (214a). Chartier's last transmission was 10 seconds later when he acknowledged the weather just given to him and asked the Tower: "got the lights up?" to which the Tower responded: "Roger" (214a-215a).

The aircraft crashed about 6:31 p.m. E.S.T. about 3½ miles southwest of the runway and just to the right of the centerline thereof. Larry L. Goldstein was killed in the crash and the pilot, Chartier, survived with injuries.

In his amended pleading (5a) the plaintiff's basic contention was that defendants,* through the negligence of the

* Defendant Pasco A. Petterutti died during the pendency of this action in the court below and his widow was appointed administratrix of his estate by the West Warwick Probate Court. Thereafter, on October 11, 1966, the District Court ordered the

pilot Chartier in the operation and control of the aircraft, were responsible in damages for the wrongful death of Larry L. Goldstein. That defendant North Central was the agent of and had complete authority from the owner of the aircraft, Pasco A. Petterutti, to do what it did—turn the aircraft over to its agent, Chartier, without any further restriction other than to get the radio fixed. Petterutti's liability as owner of the aircraft was based upon the Rhode Island "Uniform Aeronautical Regulation Act" 1 General Laws Rhode Island (1956) Ch. 4, § 1-4-3 (703a). North Central's liability was predicated upon the fact that Chartier's negligence, as agent of North Central, rendered the latter, as principal, liable for its agent's torts.

The defendants generally denied the allegations of negligence and agency in their respective answers (12a; 17a; 26a). Each pleaded the affirmative defense of "assumption of risk" by decedent (15a; 20a; 29a). Defendant Petterutti also pleaded as an affirmative defense the substance of that part of section 1-4-3, *supra,* which required him to plead, as an affirmative defense, his lack of responsibility under the statute (23a-25a).

On petitioner's appeal to the Court of Appeals he argued, *inter alia,* that (1) by permitting the jury to pass on the issue of assumption of risk, in the complete absence of *any* evidence to support such a charge, the District Court clearly prejudiced plaintiff's claim and committed reversible error, particularly in view of the fact that the requirements of the doctrine of assumption of risk, as announced by the Rhode Island Supreme Court, were not in any way met or even attempted to be met; and (2) that the trial

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administratrix substituted as a party defendant in the action (R. 407). Defendants General Oil Co. and Executive Flight Service, Inc. were dismissed from the action pursuant to plaintiff's request (R. 539 and 560; 2a).

jury was selected, over proper and timely objection, in such a manner as to violate petitioner's constitutional rights.

With respect to the District Court's method of jury selection, the Court of Appeals said: "We do not approve of the practice; . . ." Nevertheless it saw no "imminent danger" of ultimate unrepresentative selection and, because plaintiff did not prove any actual prejudice to him or decedent's widow, the lower court's ruling on this issue was not disturbed. This matter is further discussed in Point II, *infra*.

With respect to petitioner's argument that the doctrine of assumption of risk should not have been submitted to the jury under the applicable and governing Rhode Island law on the subject,* the majority opinion of the Court of Appeals could have very easily and quickly ended the whole matter by simply pointing out what it thought was the evidence which satisfied the four elements required by the Rhode Island Supreme Court (see footnote). For obvious reasons, clearly recognized by the dissenting judge, the majority did not point to any such "evidence".

Instead, the majority came up with the unbelievable proposition which, in effect, holds that: a plaintiff has no reason to complain about a charge to the jury on assumption of risk even if the risk his decedent was supposed to have assumed is never identified by any reference to evidence where the plaintiff himself was given the benefit of a charge to the jury on the doctrine of res ipsa loquitur, which relieved *him* of identifying any specific negligence

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* Which requires that "the facts in evidence disclose the existence of a risk obviously dangerous, known to and voluntarily incurred by the decedent." *Schiano* v. *McCarthy Freight System, Inc.*, 75 R.I. 253, 65 A.2d 462 (R.I. Sup.Ct. 1949).

the defendants were alleged to have committed. In other words, if plaintiff is not required to identify the negligent conduct under a res ipsa charge he should not complain if defendants are not required to identify the risk decedent was supposed to have known about and assumed under an assumption of risk charge.

It is the petitioner's contention that the majority's holding clearly ignored the requirements of Rhode Island law. That law requires that the defendant who pleads the doctrine of assumption of risk as an affirmative defense must show that the facts in evidence disclose four elements, viz., (1) the existence of a risk, (2) obviously dangerous, (3) known to, and (4) voluntarily incurred by the decedent. *Schiano* v. *McCarthy Freight System, Inc.*, supra. A mere reading of the Court of Appeals' majority opinion shows that not one of these elements was even identified. When challenged in a petition for rehearing to merely *identify* the risk, the majority did not do so. Instead, it merely used the occasion, perhaps with some foresight, to protest that it was not denying the applicability of state law but because of the existence of "special circumstances" (never defined or shown that Rhode Island considered such "special circumstances" sufficient to warrant the majority's action) the Rhode Island cases were not applicable. It then attempted to make it appear that this case merely involved a question of interpretation of the evidence, possibly with the thought of avoiding a close examination of its action in this Court. As petitioner will show in Point I, this petition for review does *not* involve a question of interpretation of the evidence. It involves a refusal by a federal court to apply the admittedly governing state law. And no matter how this refusal is attempted to be camouflaged in the majority's two opinions by reference to some fiction that substitutes what is "fair", for lack

of evidence, it remains just what the dissenting judge said it was: an attempt to "even the scales" by refusing to apply Rhode Island's doctrine of assumption of risk.

Thus, the majority decision resurrects the ghost of *Swift* v. *Tyson,* 16 Pet. (1842) by ignoring *Erie Ry.* v. *Tompkins,* 304 U.S. 64. By doing so the Court of Appeals has not only violated the Tenth Amendment to the United States Constitution and the rights of petitioner by unconstitutionally taking to itself a power reserved only to the State of Rhode Island, it has also ignored the command of 28 U.S.C. § 1652, which makes the Rhode Island law on assumption of risk the rule of decision applicable to this civil action.

ARGUMENT

POINT I

The Court of Appeals' Refusal to Apply the Law of Rhode Island on Assumption of Risk Was an Unconstitutional Assumption by That Court of a Power Reserved to Rhode Island, and Such Action Was in Violation of the Tenth Amendment to the Constitution of the United States, an Act of Congress, 28 U.S.C. § 1652, and Petitioner's Rights Under Such Constitutional and Statutory Provisions.

One reason for granting the requested writ is because the United States Court of Appeals for the First Circuit has not only decided an important state question in a way which is conflict with the law of that State, but it also *refused* to apply in this diversity case the applicable State law as clearly expressed by the highest court of that State. This contention is not only made by petitioner—it is also

made by one of the three judges* of the First Circuit. This case does not involve a question of interpretation of the evidence, as the majority opinion belatedly suggests in its opinion denying rehearing.

The Rhode Island law in question concerns the doctrine of assumption of risk. This doctrine has been subject to much criticism, 2 Harper & James, The Law of Torts, § 21.8, pp. 1191-1192, and confusion, 2 Restatement of Law of Torts 2d (1965) § 496A, comment *c;* 65 C.J.S. Negligence, § 174(1); Prosser on Torts (2d Ed.), pp. 303-305.

The doctrine is rarely followed or applied in cases arising out of airplane crashes. See, e.g., *Boise Payette Lumber Co., Inc.* v. *Larsen,* 214 F.2d 373 (9th Cir. 1954); *Lange* v. *Nelson-Ryan Flight Service, Inc.,* 263 Minn. 152, 116 N.W.2d 266, cert. den. 371 U.S. 953; *United States* v. *Kesinger,* 190 F.2d 529 (10th Cir. 1951); *Lopez* v. *Resort Airlines, Inc.,* 18 F.R.D. 37 (S.D.N.Y. 1955); *Montellier* v. *United States,* 202 F. Supp. 384 (E.D.N.Y 1962) aff'd 315 F.2d 180 (2d Cir. 1963); *Swanson* v. *United States,* 229 F. Supp. 217 (N.D.Cal. 1964); *Bruce, Admnx.* v. *O'Neal Flying Service, Inc.,* 231 N.C. 181, 56 S.E.2d 560 (Sup.Ct. N.C. 1949); *Lunsford* v. *Tucson Aviation Corp.,* 73 Ariz. 277, 240 P.2d 545 (Sup.Ct. Ariz. 1952); *Weadock* v. *Eagle Indemnity Co.,* 15 So.2d 132 (La.App. 1943); *Stoll* v. *Curtiss Flying Service* (1930), USAvR 148, 156 (N.Y. Sup.Ct. 1930), (not officially reported); *Law* v. *Transcontinental Air Transp.* (1931), USAvR 205, 214 (E.D.Pa. 1931), (not officially reported); *State, Use of Beall* v. *McLeod* (1932), USAvR 94, 97 (Sup. Ct. Balt. City, Md.), (not officially reported); cf. *Grimm* v. *Gargis,* 303 S.W.2d 43 (Sup.Ct. Mo.

* The *total* judicial compliment of the Court of Appeals for the First Circuit. See, 28 U.S.C. §44. This minimum composition of the Court also explains in very practical terms why petitioner was unable to obtain an *en banc* review of this 2 to 1 decision.

1957), 74 A.L.R.2d 599; *Sammons* v. *Webb,* 86 Ga. App. 382, 71 S.E.2d 832 (1952).

However, the doctrine is recognized and will be applied in proper situations in Rhode Island. See, *Schiano* v. *McCarthy Freight System,* 75 R.I. 253, 65 A.2d 462 (Sup. Ct. R.I. 1949); *Shine* v. *Wujick,* 89 R.I. 22, 150 A.2d 1 (Sup. Ct. R.I. 1959). And, of course, it cannot be doubted that in actions pending in the federal courts on the basis of diversity of citizenship of the parties, state law will govern the determination of such issues. *Erie Ry.* v. *Tompkins,* 304 U.S. 64 (1938). This Court observed the fundamental purpose and intent of *Erie* in *Guaranty Trust Co.* v. *New York,* 326 U.S. 99, 109 (1945):

> "In essence, the intent of that decision was to insure that, in all cases where a federal court was exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."

If this case had been tried in the Rhode Island State trial court that court would have been required to apply the doctrine of assumption of risk as announced by the Rhode Island Supreme Court in *Schiano* v. *McCarthy Freight System, Inc.,* 75 R.I. 253, 65 A.2d 462, wherein the court said of the doctrine:

> "The defense is grounded on the maxim volenti not fit injuria. Conceivably it could be applicable to a situation such as the instant one notwithstanding the nonexistence of the relation of master and servant, *provided the facts in evidence disclose* the existence of a risk obviously dangerous, known to and voluntarily

incurred by the plaintiff . . ." 65 A.2d at 464-465 [Emphasis added]

Petitioner has challenged, so far unsuccessfully, the defendants in the lower courts, and the Court of Appeals itself, in his petition for rehearing, to point to the place in the record in this case which shows that (1) "the existence of a risk", (2) "obviously dangerous", (3) "known to and", (4) "voluntarily incurred by the plaintiff", requirements under Rhode Island law, supra, were met. The challenges did in fact go further since petitioner informed the Court of Appeals during oral argument that he and his counsel would have been satisfied if someone would *merely identify* the risk that was supposed to have been assumed. The Chief Judge of the Court of Appeals also asked Chartier's counsel during the oral argument to identify the alleged risk. No answer was ever given. Even the dissenting judge was felt compelled to inquire in his opinion, "What such facts exists?" To this day this alleged "risk" has never been identified in any manner whatsoever. In short, even though there was absolutely no evidence introduced to even identify such "risk" (let alone comply with the full requirements of Rhode Island law, supra), the instruction was nevertheless given by the trial court and affirmed by the Court of Appeals.

From the inception of this litigation there never was the slightest doubt by anyone that all substantive issues in the action were governed by the law of Rhode Island by virtue of the *Erie* doctrine. This was never questioned by anyone. This included any determination of the proper applicability of the doctrines of assumption of risk and res ipsa loquitur. See, *United Air Lines, Inc.* v. *Weiner,* 335 F. 2d 379 (9th Cir. 1964) cert. dism'd. 379 U.S. 951 (1964); *Deveny* v. *Rheem Mfg. Co.,* 319 F.2d 124 (2d Cir. 1963); *Lobel* v. *American Airlines, Inc.,* 192 F.2d 217 (2d

Cir. 1951) cert. den. 342 U.S. 945; *Louisiana & A.R. Co.* v. *Fireman's Fund Ins. Co.*, 380 F.2d 541 (5th Cir. 1967); *Potter* v. *Brittan*, 286 F.2d 521 (3d Cir. 1961); *Inland Steel Co.* v. *Kachwinski*, Ind. 1907, 151 F. 219, 80 C.C.A. 571. Cf. Fed. R. Civ. Proc. 8(c); *Palmer* v. *Hoffman*, 318 U.S. 109 (1943).

Faced with the absence of any evidence of assumption of risk and the binding effect of Rhode Island law on the action, the majority of the Court of Appeals attempted to justify its holding by, as the dissenting judge called it, trying to "even the scales" by pointing out that it would be "unfair" to defendants to relieve plaintiff of the burden of proving specific negligence under res ipsa and at the same time require defendants to identify the specific risk the decedent was supposed to have voluntarily assumed. To support such an astonishing statement the Court of Appeals majority necessarily had to indulge in several fictions which were unsupported in law or fact.

First of all, the hint that res ipsa loquitur should not have been charged in this case was not before the Court of Appeals because such issue was not objected to or even raised by any of the parties on the appeal to the Court of Appeals. And, as the dissenting judge pointed out: ". . . the jury was allowed, *without objection*, to resort to this doctrine . . ." [emphasis added].

Secondly, the majority opinion overlooks the fact that the *very purpose* of the res ipsa doctrine is to accomplish exactly what the majority thought was "unfair"—i.e., relieve plaintiff of the burden of identifying the specific act of negligence in proper cases where the doctrine applies.*

* One would imagine that the res ipsa doctrine grew out of a basic unfairness and dissatisfaction in non-suiting a claimant who, because of the factual circumstances in the case (exclusive control of instrumentality causing injury in defendant, etc.), found it

Thirdly, the majority opinion chose to ignore the clear statement of the Rhode Island Supreme Court in approving the very course of action which the majority opinion gratuitously characterized as "unfair". Thus, in *Goyette* v. *Sousa,* 153 A.2d 509, 513-514 (Sup.Ct. R.I. 1959) the Supreme Court said:

> "In the Coia case *this court applied the doctrine that proof of a specific act or omission is not necessary to support a finding of negligence* where it is shown that the defendant was in exclusive control of the instrumentality which caused the injury and where the injury would not normally occur in the absence of a negligent act or omission." [Emphasis added]

How then can the majority opinion properly justify its own Swift v. Tyson version of the applicability of res ipsa in the litigation when this Court in *Erie* has already condemned such independence? Perhaps there might be some small justification for such an independent federal-common-law view if Rhode Island were silent on this subject. Cf. *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198 (1956). However, it is not silent as the law set forth in the Goyette case, supra, most clearly shows.

Fourthly, even assuming *arguendo* that the doctrine of res ipsa loquitur should not have been charged in this case, the remedy for such an "error" (assuming it was properly objected to) would most certainly *not* be to "even the scales" or to "make it up" with a "compensating" charge on assumption of risk (which was, in itself, error to give in the absence of any evidence identifying such risk). And it would not make the slightest difference in

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virtually impossible to prove any specific act of negligence. Research has failed to disclose any case where a court held it "unfair" to apply the doctrine where it was otherwise properly applicable.

attempting to justify the giving of such a "compensating" charge that it was given as the majority opines under "strictly controlled circumstances". A charge to the jury on an issue unsupported by any evidence can never overcome the prejudicial effects or be "controlled" by any instruction to the jury, "strict" or otherwise. For, as Justice Jackson accurately observed in *Krulewitch* v. *United States,* 336 U.S. 440, 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

If such a "compensating" charge or "even the scales" theory ever existed in the common law systems of England or this Country, it most certainly never existed in Rhode Island, the only State law with which the Court of Appeals should have been concerned.

Fifthly, the "unfairness" alluded to by the majority opinion was in itself a fiction. This "unfairness" to defendants was supposedly based upon the fact that under res ipsa plaintiff was relieved from the burden of pointing to the specific acts or omissions constituting the alleged negligence. However, as pointed out to the Court of Appeals, plaintiff introduced into evidence, under count one of his complaint (5a), that Chartier: (1) flew the aircraft below the glide slope; (2) flew the aircraft below the minimum safe altitude authorized; (3) decided to "give it a try" when the other aircraft were continuing with their hold positions or leaving for alternate airports; (4) attempted to land without having visual reference to the ground; (5) refused to stay in his hold position, insisting on "giving it a try" anyway; (6) did not proceed to the alternate airport designated by him in his flight plan; (7) did not return to Bridgeport when the weather got

worse; (8) did not attempt to fly to any other airport where the weather was above minimums, the identification of which he could have easily determined by calling on the radio he just had repaired; (9) tried to land with a faulty altimeter in weather which was below minimums; (10) negligently executed his attempted instrument approach and landing. The record is replete with evidence of these specific failings of defendant Chartier. The District Judge himself recognized and also itemized several of these contentions upon which evidence was introduced (653a).

It rings flat, therefore, when the Court of Appeals majority infers that it was "unfair" to defendants because, under the res ipsa charge, plaintiff did not have to point to the specific act or omission of negligence. It closed its eyes to the alternative count one of the complaint alleging specific negligence and the evidence throughout the record which was introduced in support thereof. Let there be no mistake about it—the defendants well knew the negligence of which they were accused, since they obviously heard it in plaintiff's counsel's opening, the evidence itself, and the closing arguments to the jury.

Sixthly, the majority opinion's assumption that the District Judge was "bothered by the possible unfairness . . ." is totally unwarranted and unsupported by the record. The assumption is merely another one of the majority opinion's building blocks supporting its federal-common-law approach to getting around the cold fact that there was no evidence to support the assumption of risk instruction.

The truth of the matter is that the record shows that the trial judge could not have been "bothered" by any possible "unfairness" because he was very definite and

satisfied when he denied plaintiff's motion to dismiss the assumption of risk defenses (659a) well *before* he finally made up his mind about granting plaintiff leave to amend his complaint to add a res ipsa count (663a-667a). It is difficult therefore to reconcile the majority's finding that the trial judge's decision to permit the assumption of risk issue to go to the jury was based upon his decision to "even the scales" because he was "bothered" by a decision on res ipsa which he had not even reached up to that time.

And Seventh, the majority opinion's own federal-common-law view cannot stand as a legal proposition even in the pre-*Erie* vacuum the majority assigned to it. The majority opinion takes pains to create its straw man by setting forth a major premise (one can assume only a known risk) and a minor premise (res ipsa permits a finding for plaintiff without a determination of any specific fault). It correctly observes the major and minor premises were made by plaintiff. However, these contentions were made by plaintiff in the courts below as independent propositions of law and were advanced at different times and for different reasons. The majority opinion incorporates them into a syllogism, assigning plaintiff as the author. However, it is the Court of Appeals' majority—not petitioner—which draws the conclusion to the syllogism (how can it be found that plaintiff assumed a risk not specifically established). As far as petitioner is concerned the majority's conclusion is as wrong as can be.

This is because its major and minor premise, like oil and water, will not mix. That is, the majority confuses "risk" (major premise) with "fault" (minor premise). Whether or not it was specifically identified or established, "fault" (i.e., pilot negligence) was not and could not be *assumed* by the decedent; the majority admits this. A

plaintiff (any plaintiff) can only assume a "risk"—he cannot assume a "fault" (pilot negligence).

One can only wonder what the majority opinion would have said if res ipsa loquitur had *not* been charged to the jury. It is presumed that under those circumstances the majority *then* would have spent its time looking for the evidence to warrant an instruction on assumption of risk, hopefully spending less time on matters *never* raised by counsel in any court, e.g., the majority's reference to a "joint venture", a reference clearly unsupported by the facts and the federal regulations imposing upon Chartier the "pilot-in-command" status, 14 C.F.R. § 43.70 (1962-63 Ed.); see, also, *Lange* v. *Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108 N.W. 2d 428 (1961).

The point of all this is to emphasize to this Court not only the complete absence of any Rhode Island authorities to support the Court of Appeals majority view, but also to point out that the majority did not even pretend to base its view on any Rhode Island cases. Nowhere in the majority's main opinion or its opinion on rehearing does it cite any Rhode Island authority for its novel proposition. The truth of the matter is that the law in Rhode Island on assumption of risk and res ipsa loquitur is exactly the opposite. See, *Schiano* v. *McCarthy Freight System, Inc.*, and *Goyette* v. *Sousa, supra.* The majority cites no Rhode Island authority (or any other, for that matter) disagreeing with these two cases. Obviously, there are none and the majority surely must have known it.

The majority's main opinion refers to "certain risks" and in its rehearing opinion to "special circumstances", in neither case ever identifying where in the record these "certain risks" or "special circumstances" were to be found. Actually, the fact that decedent had absolutely

no reason for concern when he entered the airplane in Bridgeport for the trip back to Providence is clearly established throughout this record.*

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* What decedent was actually facing and knew at this time was made very clear by the undisputed evidence showing that the pilot Chartier:

(1) Held numerous airplane ratings and pilot certificates (407a; 454a; 515a-516a);

(2) Also held a Flight Instructor's Certificate (515a);

(3) Was qualified to teach, and did teach, instrument flying (516a);

(4) Had recently taken his F.A.A. instrument flight check (522a);

(5) Was the decedent's own flight instructor (517a);

(6) Had over 3,600 hours of flying time as a pilot (407a; 523a);

(7) Had flown Petterutti's aircraft before (523a);

(8) Had made up to 50 landings at Green Airport (486a);

(9) Had made about 20 I.L.S. Approaches to Green Airport (584a);

(10) Had an excellent reputation as a pilot (330a-331a; 407a; 618a; 623a; 632a);

(11) Had a reputation as an "old" pilot rather than a "bold" pilot (618a);

(12) Was flying an aircraft that was in excellent mechanical condition (632a), one in "A-1 condition" (331a);

(13) Was flying an aircraft which had the "best maintenance" (427a);

(14) Could and would (and did) execute a missed approach if he could not execute a normal landing because of weather conditions (527a);

(15) Checked the Providence weather conditions hourly while he was at Bridgeport Airport (529a);

(16) Filled the aircraft's gas tanks to capacity while at Bridgeport (529a);

(17) Knew the Providence weather minimums before he took off from Bridgeport (531a);

(18) Also checked these minimums again before leaving Bridgeport (532a; 543a-544a);

(19) Knew that the weather conditions at Providence were *above* weather minimums for the airport at the time he made his take-off from Bridgeport Airport (545a);

In short, when the decedent boarded the airplane for the return trip to Providence, he knew he would be travelling with a highly qualified, 3,600-hour plus, pilot who was not only qualified to fly on instruments but was also recently checked by the F.A.A. for these abilities, in a familiar airplane that had the best maintenance and was in A-1 mechanical condition, and whose radio had just been repaired, to an airport at which the pilot had previously made as many as 50 landings and about 20 I.L.S. instrument approaches, and whose weather was reported above the weather minimums for the airport (thus permitting a visual landing), with more than enough gasoline to return to Bridgeport or land at the alternate designated by the pilot in his I.F.R. flight plan if the weather got worse.

That is the undisputed evidence which the majority opinion chose to ignore. If anything, this knowledge would have reassured the decedent, particularly in view of his own limited flight experience. He was just enough of a pilot to appreciate Chartier's skill and competence. The dissenting judge readily recognized this.

That petitioner was prejudiced by the instruction on assumption of risk is clear from the general verdict for

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(20) Knew that the weather conditions at Providence improved while he and decedent were at Bridgeport (490a). Bielecki, who was also at Bridgeport that afternoon, testified that the forecast while he was at Bridgeport was that the Providence weather would improve (444a);

(21) Filed an I.F.R. flight plan to Green Airport, listing Boston as an alternate landing place (489a; 547a);

(22) Knew that the primary purpose of establishing weather minimums for an airport, is safety (545a);

(23) Knew he was in good physical condition before the accident (549a);

(24) Had sufficient fuel to go to his alternate landing field in Boston or return to Bridgeport, if necessary (547a-548a).

defendants. See, *St. Louis, I.M. & S. Ry. Co.* v. *Needham,* 63 Fed. 107, 114 (C.C.A. 8th 1894); *Baltimore & O.R. Co.* v. *Reeves,* 10 F.2d 329, 330-331 (C.C.A. 6th 1926); *North American Graphite Corp.* v. *Allan,* 184 F.2d 387, 389 (C.A. D.C. 1950); *Maryland* v. *Baldwin,* 112 U.S. 490, 492 (1884). See, also, *O'Keefe* v. *William J. Barry Co.,* 311 Mass. 517 (1942).

The majority's view is totally unsupported by state law. As early as 1940 Judge Magruder speaking for the First Circuit Court of Appeals stated in *Sampson* v. *Channell,* 110 F.2d 754 (1st Cir. 1940), cert. den. 310 U.S. 650, the chaotic effect of ignoring *Erie*:

> "If the federal court in Massachusetts on points of conflict of laws may disregard the law of Massachusetts as formulated by the Supreme Judicial Court and take its own view as a matter of 'general law', then the ghost of Swift v. Tyson still walks abroad, somewhat shrunken in size, yet capable of much mischief."

The majority's opinion in the Court of Appeal does nothing more than to resurrect the "injustice and confusion incident to the doctrine of Swift v. Tyson", *Erie Ry.* v. *Tompkins,* 304 U.S. 64, 77 (1938). The Court of Appeals should, therefore, be reversed. Cf. 28 U.S.C. §1652.

POINT II

The Method of Selecting the Jury in this Case Violated Plaintiff's Rights Under the Fifth and Seventh Amendments to the Constitution of the United States.

At the very beginning of the trial plaintiff attacked the method by which jurors were selected. Plaintiff challenged the array and moved to disqualify the entire panel (35a-36a). The Trial Judge overruled the challenge and denied the motion (37a). Subsequent to the verdict and entry of judgment, plaintiff filed, pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure, a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial; one of the grounds urged for the granting of a new trial was that plaintiff's constitutional rights had been violated by the manner in which the trial jury was selected (650a).

Upon the argument of the motion, the Clerk of the United States District Court for the District of Rhode Island was examined under oath in open court in regard to the method used in the selection of jurors for the trial of this case (739a-752a). The Clerk's testimony disclosed the following facts:

A list of names was compiled by the jury commission from voting lists, telephone directories and street directories from throughout the State (740a). Letters of transmittal and questionnaires containing questions designed to determine the recipients' qualifications to serve as jurors and also eliciting certain other information of interest to the jury commission were mailed to those persons whose names appeared on the list (740a).

As questionnaires were returned they were examined and if the qualifications required by Title 28, Section 1861,

U.S.C.A., were found to be present and if certain subjective criteria for disqualifications were found not to be present, the names of the persons returning the questionnaires were placed upon three by five (3x5) inch cards together with the person's address and occupation (740a-741a, 743a-744a). The cards were placed in a box and at a time designated by the Chief Judge of the District Court cards were drawn from the box in open court to the number of jurors required for the April Term of Court (741a). The names of the prospective jurors so drawn then were arranged on an alphabetical list prepared by a Deputy Clerk of the Court and from time to time, as a need for a panel of jurors arose, names were taken in alphabetical order from the list (747a-748a).

At the time of the trial of this case, the alphabetical listing of prospective jurors had reached names beginning with the letter "T". A panel of thirty-five prospective jurors were summoned to appear in Court on the first day of the trial. The thirty-five summoned were those whose family names were listed consecutively in alphabetical order on the jury list for the April Term starting with "Tscheurekdjian" and ending with "Zucherberg", both inclusive (Plaintiff's Exhibit 42). The first twelve names on the alphabetical list were called and those persons were directed to sit in the jury box (42a). The Court conducted the *voir dire* examination during the course of which one of the original twelve persons called was excused. Her place was filled by calling the next name on the alphabetical list. After selecting twelve jurors in the manner specified above, the Court proceeded to the selection of two alternates, again using the same alphabetical system.

Petitioner submits that there are two fatal flaws in the method used in selecting the jury in this case. Firstly,

improper subjective criteria not sanctioned by the pertinent statutory provisions were utilized by the jury commission in its initial determinaton as to whether a name was to be placed in the master jury box without any supervision whatsoever by the Court. Secondly, and perhaps the more serious flaw, the calling of prospective jurors to Court and the selection of the trial jury based upon alphabetical listing of family names was not a truly random selection of a jury of one's peers as required by the Fifth and Seventh Amendments to the Constitution of the United States.*

—A—

The Jury Commission, consisting of the Jury Commissioner and the Clerk of Court, have some discretion in the selection of prospective jurors. However, this discretion must be exercised under proper supervision by the court, *United States* v. *Kelly* (2d Cir.), 349 F.2d 720. And in any event, the statutory standards of qualification may not be extended by broad or vague subjective tests, *Rabinowitz* v. *United States* (5th Cir.), 366 F.2d 34, 51.

The Clerk of Court testified that the questionnaire utilized by the Jury Commission included not only the qualifying questions apparently required under the provisions of Title 28, Section 1861, U.S.C.A., but also addi-

* Petitioner should make it clear that he is not complaining as to the individual qualifications (illiteracy, etc.) of the prospective jurors on the panel although it would appear that he might have had some reason to be apprehensive on this score. See, Questionnaire on Current Jury Selection Methods as completed by the Clerk of the District Court of Rhode Island, Hearings on Federal Jury Selection Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate, Ninetieth Congress, First Session On S.383, S.384, S.385, S.386, S.387, S.989, S.1319 (Printed for the use of the Committee on the Judiciary, 1967) at pp. 1144-1147, question no. 6.

tional questions which ". . . the Jury Commission is interested in . . ." (740a). The use to which the answers to these non-required questions was put by the Jury Commission is shown by that portion of the Clerk of Court's testimony dealing with the exclusion by the Jury Commission of certain persons engaged in the service of the United States Government, of spouses of such persons, and of females who appeared to be mothers of small children (743a-744a). The Clerk further testified that the Commission would exclude those persons who the members of the Commission felt would desire to be excused (744a).

Government employees and their spouses are qualified to serve as jurors in Federal Courts even in criminal cases in which, of course, the Government is the complaining party, *Marshall* v. *United States* (10th Cir.), 203 F.2d 561, 562. *A fortiori,* a Government employee or his spouse should not be disqualified from sitting as a juror in a civil case in which the Government is not a litigant.

Congress at the time of this trial provided in Title 28, Section 1863, U.S.C.A., a method for excluding or excusing from jury service certain persons or classes of persons. Section 1863 then read as follows:

> "§ 1863. *Exclusion or excuse from service.*
>
> (a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.
>
> (b) Any class or group of persons may, for the public interest, be excused from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

(c) No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color."

It is important to note that Congress deemed it necessary for a District Judge to make the determination as to whether one should be excused or excluded under the provisions of the quoted Section. The Clerk testified that neither of the judges of the United States District Court for the District of Rhode Island had entered any order under the provisions of Section 1863 (745a). It is apparent, therefore, that the Jury Commission's decision to excuse or exclude the members of the groups referred to above from the master jury box constituted an unlawful exercise of discretion by the Jury Commission. It also is apparent that no guide lines within which the Jury Commission's discretion was to be exercised had been established by the Court. To permit the Jury Commission to exercise its discretion in an unfettered manner based upon vague and subjective standards known only to the members of the Commission is to do violence to the statutory scheme created by Congress and set forth in Title 28, Sections 1861 *et seq.*, U.S.C.A.

—B—

"The law contemplates that drawing of jurors shall be by lot." *The Jury System in the Federal Courts,* 1960 Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409 at 479, 480.

The Trial Judge in ruling on plaintiff's challenge to the array and motion to disqualify the entire panel stated that the point on which the attack was based concerned

him and indicated that he had researched the law bearing on the subject. He went on to state:

> ". . . There is a dearth of authority that bears directly on this particular subject." (36a)

Petitioner's counsel have been unable to find any reported case in which jurors have been selected in the manner now under review. The whole concept of a strictly alphabetical arrangement is so foreign to our traditional the selection of jurors for a trial panel based on the alphabetical ararngement is so foreign to our traditional concepts of trial by jury that it is apparent that the method of selection here used is peculiar to the United States District Court for the District of Rhode Island.

It is clear that in civil proceedings the American tradition of trial by jury contemplates an impartial jury so drawn as to be a fair representative cross section of the community, *Thiel* v. *Southern Pacific Company,* 328 U.S. 217. An alphabetical arrangement of jurors is fraught with potential danger to the concept that a jury should consist of a random cross section of the community. It is easy to conceive of a jury with a particular religious or ethnic bias by reason of the manner of selection here involved. Clearly, once the jury list for a court term has been set up in an alphabetical order chance has been removed as an element in the selection of jurors for particular cases. In order to insure random selection and a fair trial, chance should be an element in selecting the panel of jurors from which a particular jury is chosen:

> ". . . Our whole constitutional background points to the necessity of having the selection of our juries free of the whim and caprice of the selectors. *Such selection must be strictly within the realm of chance.*"

(Emphasis added) *United States* v. *Standard Oil Company,* 165 F.Supp. 359 at 363 (D.C. Indiana).

The principles referred to above were disregarded in two aspects of the case at bar: First, with respect to the appearance in court on the first day of trial of approximately thirty-five veniremen, all of whose names appeared on the alphabetical list referred to above in consecutive order, and, second, with respect to the selection of the actual trial jury in alphabetical order from said veniremen.

—C—

The United States Court of Appeals for the First Circuit in passing on this issue stated as follows:

> "Finally, or, more accurately, initially, plaintiff objected to the venire on the ground that the jury had not been properly chosen. This matter boils down to the fact that from a list properly compiled the clerk, having rearranged the list alphabetically, in accordance with his practice sent to the courtroom for the final drawing a single segment alphabetically contiguous, in this case the names running from T to Z. We do not approve of the practice; it would have been better to have selected even from this small list at random. Nonetheless, plaintiff has not been able to show, or suggest, any prejudice, and we are not persuaded of any. We see no imminent danger of ultimate unrepresentative selection such as appeared in *New England Enterprises, Inc.* v. *United States,* 1 Cir., 1968, 400 F.2d 58. In the absence of a likelihood of some general prejudice, we find inapplicable the rule of *Ballard* v. *United States,* 1946, 329 U.S. 187, 195 (where class of citizens systematically excluded from jury panels, 'reversible error does not depend on a showing of prejudice in an individual case')."

It is respectfully submitted that the Court below in disapproving of the method of jury selection in this case, but still refusing to reverse on that ground, because "plaintiff has not been able to show, or suggest, any prejudice . . . ", is clearly in error and in direct violation of the clear mandate of this Court as stated in *Ballard* v. *United States*, 329 U.S., 187, 195. In that case, this Court stated the general rule as follows (p. 195):

> "While the litigant seeking a new trial on a challenge to the array of jurors must produce evidence to support the challenge (Citations omitted), that evidence may be confined, as here to the general method of jury selection, without showing that the particular jury that tried the case was deficient, and consequently, without establishing prejudice to the particular litigant usually prerequisite for invoking remedial action."

In the case of *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F.2d 414 (3d Circuit), (Court of Appeals, Third Circuit), cert. den. 350 U.S. 971, the Court indicated the reasoning underlying the opinion in *Ballard*, as follows (p. 424):

> ". . . The officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not

blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberty."

The Court below in failing to see any danger of ultimate unrepresentative selection or the likelihood of some general prejudice in this alphabetical method of selecting jurors apparently chose to ignore the obvious possibilities and dangers inherent in this method. For example, if one had a list of jurors with the family name starting with "O" the likelihood of having practically an entire jury of Catholic Irish is obvious, or, if one had a list of names starting with the letter "G" the likelihood of having a jury made up almost entirely of persons of Jewish decent is equally obvious. One could cite examples *ad infinitum* to illustrate this basic point that the method followed in this case is inherently defective in that it does not reasonably insure the selection of a representative cross section of the community, but, on the contrary, is fraught with the possibilities of having a disproportionate share of persons of the same religion or of the same racial background on the same jury.

Respondents in this case will probably refer to the fact that since the trial of this action the jury selection method used in this case has been abandoned and the District Court of Rhode Island is no longer listing and selecting jurors in alphabetical order. Respondents will probably argue, as they did in the Court below, that since the District Court is no longer employing this method there is no reason for this Court to consider this issue or to concern itself with a system that is no longer being employed. However, it is submitted that such an argument misses a very fundamental point; plaintiff's basic constitutional rights have been violated and she is entitled

to a remedy. That remedy is a new trial in the District Court before a jury that is properly selected under the new method now in use in that Court.

CONCLUSION

It is respectfully submitted that the refusal of the Court below to apply the law of Rhode Island on the assumption of risk was an unconstitutional assumption by that Court of a power reserved to Rhode Island in violation of the Tenth Amendment to the Constitution of the United States, an Act of Congress (28 U.S.C. § 1652) and petitioner's rights under such constitutional and statutory provisions, and that the method of selecting the jury in this case was in violation of the Fifth and Seventh Amendments to the Constitution of the United States, an Act of Congress (28 U.S.C. §§ 1861 *et seq.*) and petitioner's rights thereunder.

Prayer

For the foregoing reasons, petitioner prays that this petition be granted to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed with direction that the case be remanded to the District Court for a new trial, and that petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7101

CHARLES F. KRAUSE, Administrator, etc.,

Plaintiff-Appellant,

—v.—

LUCIEN ANDRE CHARTIER, *et al.,*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

William F. X. Geoghan, with whom *Edward M. O'Brien, Michael Silverstein,* and *Higgins & Silverstein* were on brief, for appellant.

John T. Keenan, with whom *Thomas J. Kane* was on brief, for Lucien Andre Chartier, appellee.

Guy J. Wells, with whom *Thomas D. Gidley* and *Hinckley, Allen, Salisbury & Parsons* were on brief, for Elvira Pet-

terutti, Administrator of the Estate of Pasco A. Petterutti, appellee.

Stephen A. Fanning, Jr., V. Duncan Johnson, and *Edwards & Angell* on brief for North Central Airways, Inc., appellee.

December 27, 1968

ALDRICH, *Chief Judge.* This is an appeal by the administrator of one Goldstein, plaintiff in a diversity action brought to recover for the death of Goldstein in the crash of a private airplane, in which the jury found for the defendants. Goldstein was a guest passenger, and the principal defendant was Chartier, the pilot of the plane. The facts, so far as known, were relatively undisputed. Goldstein was dead, and while Chartier survived the crash, and testified at the trial, he lacked all memory of the immediate events.

Chartier was an experienced pilot and a licensed instructor. For some months he had been instructing Goldstein. On the day in question Goldstein planned to take a solo flight from Providence to New Haven. Because of weather conditions he was unable to do so, being qualified only for visual flying. He therefore accepted a ride with Chartier, who was flying a plane belonging to one of the other defendants to Bridgeport to have the radio repaired. Chartier went first to New Haven, where he tried an instrument approach, but desisted (a so-called missed approach) when ground visibility proved to be below minimums. He proceeded to Bridgeport, where the radio was fixed, and then, after checking the weather report, started back for Providence. At Norwich he was instructed to "hold," and

while doing so he noticed his altimeter had lagged, which required him to change his altitude. Permission was then received to approach Providence, but with instructions that the ceiling at the moment was below minimums and the "weather indefinite," by which, apparently, was meant variable. There were other places open and in this situation better practice might have been not to come in, but, as we have stated, it was not forbidden. Chartier started the approach and crashed 3½ miles from the field, which was well prior to the point where it would have been proper to decide to execute a missed approach. The plane had dual controls, but there was no evidence that Goldstein was participating in the handling. There was affirmative testimony that Goldstein had been told in advance of some of the weather conditions, and in view of the relationship of the two parties and his knowledge and abilities in flying we believe the jury would have been warranted in inferring that he as not ignorant of any circumstances known to Chartier.

The complaint was in two counts, one being based upon the doctrine of res ipsa loquitur. The defendants pleaded, *inter alia,* assumption of the risk. At the close of the evidence the plaintiff moved to strike this defense. The motion was denied. We are content to regard this, as apparently did the district court, as an appropriate way to raise the point that the defendants were not entitled to go to the jury on this issue.[1]

Plaintiff's request posed a substantial problem for the district court. We start with the proposition that while the

[1] We are not content, on the other hand, to accept the claim of one of the defendants that plaintiff's subsequent submission of requests for instructions on this issue was an "obvious" waiver, and an "incredible" invitation to error. The ruling having been made, it was neither.

burden is on the plaintiff to prove negligence, it has been held that an airplane accident may, as plaintiff contended, present a prima facie case under the doctrine of res ipsa loquitur. *Cf. O'Connor* v. *United States,* 2 Cir., 1958, 251 F.2d 939; *United States* v. *Johnson,* 5 Cir., 1961, 288 F.2d 40; *Swanson* v. *United States,* N.D.Cal., 1964, 229 F.Supp. 217. We have the further proposition, recognized in Rhode Island, that in appropriate circumstances a plaintiff may be found to have assumed a risk. *James* v. *Rhode Island Auditorium, Inc.,* 1938, 60 R.I. 405, 199 A. 293; *Schiano* v. *McCarthy Freight System, Inc.,* 1949, 75 R.I. 253, 65 A.2d 462. Plaintiff says that as one can assume only a known risk, see *Shine* v. *Wujick,* 1959, 89 R.I. 22, 150 A.2d 1, and as a res ipsa case permits a finding for the plaintiff without a determination of any specific fault, how can there be a finding that the plaintiff assumed a risk which was not specifically established.

As a matter of syllogistic argument plaintiff's contention has appeal. To reject it, at a minimum, is to dilute the strength of a res ipsa case, which plaintiff would say means that, in one breath, the law giveth and the law taketh away. But before we are moved by this complaint, it would be well to consider what is the strength of a res ipsa case, particularly in this field. In *United States* v. *Johnson, supra,* a divided court held for the plaintiff, concluding with the following reasoning, 288 F.2d at 45,

> "The failure to produce more satisfactory evidence of negligence vel non is chargeable to the Government rather than to the plaintiffs. The failure of a part [sic] to produce relevant and important evidence within its peculiar control raises the presumption that if produced the evidence would be unfavorable to its cause. Under the circumstances of this case, the dis-

trict court did not err in applying the doctrine of res ipsa loquitur."

In dissent, Chief Judge Tuttle observed,

> "I think this is not a proper case for application of the doctrine of res ipsa loquitur. It is *not* true that a jet airplane crashes only if the pilot is *negligent*. Such crashes may be attributable to many things, such as structural defects, conditions of weather, excusable errors in pilot judgment falling far short of pilot *negligence*, and the like. . . ." (Ital. in orig.)

Similarly, in *O'Connor* v. *United States, supra,* the court said, 251 F.2d at 941,

> "The Air Force held a hearing to investigate the accident, but on the trial counsel for defendant refused to produce the record of the investigation. Thus plaintiff was effectively prevented from obtaining information which might have enabled her to allege negligence with more particularity. . . ."

The court went on to point out that there was more to the case than the mere fact there was an accident, and concluded,

> "Under these circumstances we think that the *res ipsa loquitur* doctrine was applicable."

And finally, in plaintiff's case of *Swanson* v. *United States, supra,* although the court spoke of res ipsa, it analyzed the various claims of specific negligence and after eliminating all but one, pointed out possible negligence in connection with that one and used the doctrine of res ipsa merely to enforce its conclusion.

In the absence of such factors in the case at bar the court might well have considered ruling that this was not a proper case for the application of res ipsa. On this we need not pass. We do decide, however, that this plaintiff has no valid objection to the course it did take. Not unreasonably, bothered by the possible unfairness of permitting the jury to find for the plaintiff without his having to show what particular circumstance caused the accident and at the same time totally depriving the defendant of the right to say that plaintiff assumed the risk, it permitted the jury, under strictly controlled circumstances, to find assumption of the risk if decedent consented to and accepted the substantial factors upon which a res ipsa case might be predicated, but excluding in this regard negligence of the defendant.[2] We believe such a charge appropriate to the facts of this case, where decedent was not an ignorant passenger who could not be charged with consent simply because

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[2] The court charged the jury, in part, as follows.

"The defense of assumption of risk is in fact quite narrowly confined and restricted by two requirements: First; that the plaintiff . . . must know the risk and must understand the risk he is incurring, and second: that his choice to incur it must be entirely free and voluntary. . . . In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has expressly given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a know risk arising from what the defendant is to do or to leave undone.

. . . .

"You are instructed that a person who takes an airplane ride as a guest of the pilot, and in this case it may be said for pleasure since it was for his own purposes—he assumes all ordinary risks incident to the undertaking, except, however, the negligence of the pilot."

The court's excluding "negligence of the pilot" might, perhaps, have been amplified to say affirmative mishandling of the controls, or other action which Goldstein did not have reason to anticipate, but plaintiff did not ask for such elucidation and has no complaint.

he knew the weather was poor, but was, as we have pointed out, one whom the jury could find was a fully informed joint venturer who could be found to have known that there were certain risks. The case is not like *Schiano* v. *McCarthy Freight System, supra,* where the court expressly noted that the plaintiff there was unaware that any risk was involved. The jury need not have made such findings, but in so submitting the issue of assumption of the risk we believe the court committed no error.

During trial the plaintiff offered in evidence a CAB report of an investigation of the accident which contained a statement that the plane's altimeter was damaged in the crash. A dispute arose whether this portion of the report was opinion evidence inadmissible under 49 U.S.C. § 1441 (e). *Cf. Berguido* v. *Eastern Air Lines, Inc.,* 3 Cir., 1963, 317 F.2d 628, *cert. denied* 375 U.S. 895; *Fidelity & Cas. Co.* v. *Frank,* D.Conn., 1964, 227 F.Supp. 948, *modifying* 214 F.Supp. 803. The court having indicated that it was, the plaintiff withdrew the entire offer. On this appeal, in which plaintiff complains of the exclusion of the opinion concerning the altimeter, defendants claim that the court had not finally ruled with respect to this portion and that plaintiff had not adequately saved his rights. Having examined the record, we conclude that the plaintiff did not fulfill the duty that is upon the objecting party to make clear to the district court that he is pressing his point, and what point it is; we think that the court was justified in believing plaintiff had accepted a ruling which the court had been prepared to consider further. Concededly this matter is close, but the burden is on the plaintiff. Particularly is this so where the trial judge had a third choice in addition to simply admitting or excluding the evidence.

Finally, or, more accurately, initially, plaintiff objected to the venire on the ground that the jury had not been properly chosen. This matter boils down to the fact that from a list properly compiled the clerk, having rearranged the list alphabetically, in accordance with his practice sent to the courtroom for the final drawing a single segment alphabetically contiguous, in this case the names running from T to Z. We do not approve of the practice; it would have been better to have selected even from this small list at random. Nonetheless, plaintiff has not been able to show, or suggest, any prejudice, and we are not persuaded of any. We see no imminent danger of ultimate unrepresentative selection such as appeared in *New England Enterprises, Inc.* v. *United States,* 1 Cir., 1968, 400 F.2d 58. In the absence of a likelihood of some general prejudice, we find inapplicable the rule of *Ballard* v. *United States,* 1946, 329 U.S. 187, 195 (where class of citizens systematically excluded from jury panels, "reversible error does not depend on a showing of prejudice in an individual case").

Affirmed.

COFFIN, *Circuit Judge* (dissenting). I dissent from only that part of the court's opinion relating to assumption of risk. I do so, not because the court has not devised an approach consistent with fairness under the circumstances of this case, but because I feel that such an approach is not consistent with such Rhode Island law as has been called to our attention.

To begin with, the res ipsa bridge has been crossed in this case. Perhaps it should not have been. But that the jury was allowed, without objection, to resort to this doctrine, seems to me an inadequate reason for attempting to

even the scales by refusing to apply Rhode Island's doctrine of assumption of risk.

Under Rhode Island law it is the court's obligation not to allow a jury to consider an assumption of risk defense unless the evidence shows that there was a risk, *obviously dangerous in nature,* which the decedent recognized and voluntarily assumed. *Shine* v. *Wujick,* 89 R.I. 22, 150 A. 2d 1 (1959); *Schiano* v. *McCarthy Freight System,* 75 R.I. 253, 65 A.2d 462 (1949).

The court, in distinguishing *Schiano,* places emphasis on the fact that the plaintiff there was unaware of any risk. To justify an assumption of risk instruction in this case, however, the record would have to show facts capable of being designated an obviously dangerous risk. What such facts exist? The court has properly, I think, implied that it would not charge consent to "an ignorant passenger . . . simply because he knew the weather was poor. . . ."

The remaining information available to decedent in this case included his knowledge as a student of flying, and specific knowledge that his pilot was an experienced teacher skilled in instrument flying, that a "missed approach" was a standard technique for coping with excessively low ceilings and had been successfully executed that same day, that the radio had been repaired at Bridgeport, that, shortly prior to the fatal flight, the ceiling at Providence was above minimums, that Boston had been designated an alternative landing field, and that the aircraft had plenty of gas. The effect of all this, in my view, is to minimize in decedent's mind whatever risk might be thought by an ignorant passenger to inhere in poor weather conditions.

I therefore see no factual basis on which a jury could properly conclude either that there was an obviously dangerous risk or that decedent could have recognized and assumed such a risk.

Opinion of the Court of Appeals on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7101

CHARLES F. KRAUSE, Administrator, etc.,

Plaintiff-Appellant,

—v.—

LUCIEN ANDRE CHARTIER, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

William F. X. Geoghan, with whom *Edward M. O'Brien, Michael Silverstein,* and *Higgins & Silverstein* were on brief, for appellant.

John T. Keenan, with whom *Thomas J. Kane* was on brief, for Lucien Andre Chartier, appellee.

Guy J. Wells, with whom *Thomas D. Gidley* and *Hinckley, Allen, Salisbury & Parsons* were on brief, for Elvira Petterutti, Administrator of the Estate of Pasco A. Petterutti, appellee.

Opinion of the Court of Appeals on Rehearing

Stephen A. Fanning, Jr., V. Duncan Johnson, and *Edwards & Angell* on brief for North Central Airways, Inc., appellee.

OPINION ON PETITION FOR HEARING

February 4, 1969.

PER CURIAM. Plaintiff's petition for rehearing on the question of assumption of the risk asserts that the majority of the court, hereafter court, has elected to disregard the tenets of *Erie Ry.* v. *Tompkins.* The court does not in any way deny the applicability of state law; it merely, because of the existence of special circumstances, does not regard the reported state decisions as dictating a result in plaintiff's favor. The last portion of his dissent makes clear that our Brother Coffin interprets the evidence as denying rather than supporting the possibility of finding special circumstances, because he interprets the evidence as reassuring to the decedent, rather than the reverse. He therefore finds the decided Rhode Island cases controlling. We do not agree. When what the jury could have found to be joint venturers learned, for example, that there was trouble with the altimeter, this would seem anything but reassuring in an instrument flight.

The balance of the petition is flatly in violation of the language and intent of Local Rule 6.

The petition for rehearing is denied. This opinion is by the majority of the court.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7101

CHARLES F. KRAUSE, Administrator, etc.,

Plaintiff-Appellant,

—v.—

LUCIEN ANDRE CHARTIER, *et al.,*

Defendants-Appellees.

Entered December 27, 1968

This case came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk

[cc: Messrs. Geoghan, Keenan, Fanning and Wells.]

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7101

CHARLES F. KRAUSE, Administrator, etc.,

Plaintiff-Appellant,

—v.—

LUCIEN ANDRE CHARTIER, *et al.*,

Defendants-Appellees.

Entered February 4, 1969

It is ordered that the word "defendant" in the 23rd line of page 5 of the opinion of the Court be, and the same hereby is changed to the word "plaintiff"; and further

It is ordered that the petition for rehearing filed on January 10, 1969, be, and the same hereby is, denied.

By the Court:

ROGER A. STINCHFIELD, *Clerk*

By /s/ DANA H. GALLUP
Chief Deputy Clerk

[cc: Messrs. Geoghan, Keenan, Fanning and Wells.]